DOCUMENT RESUME

ED 164 644 UD 018 884

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TITLE Competency Testing and Handicapped Students.
INSTITUTION Harvard Univ., Cambridge, Mass. Center for Law and Education.
PUB DATE Mar 78
NOTE 7p.; For a related document, see UD 018 882; Not available in hard copy due to institution's restriction
JOURNAL CIT Clearinghouse Review; p922-27 Mar 1978

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Academic Achievement; *Basic Skills; *Educational Accountability; *Educational Discrimination; *Educational Legislation; Graduation Requirements; *Handicapped Students; *Minimum Competency Testing; Secondary Education; Senior High Schools; Test Bias

ABSTRACT

This article discusses the fairness and legality of competency testing programs for the handicapped. The following concerns are addressed: (1) exemptions for handicapped students; (2) individual determinations; (3) differential diplomas and standards; and (4) differential assessment procedures. A discussion of the legal implications indicates that, although the Federal Constitution, statutes, and regulations (as well as comparable provisions in many states) provide handicapped persons with special protection against unfair and discriminating practices, neither they nor the courts provide specific guidance regarding competency testing of handicapped students. This paper suggests that if parents and policy-makers decide to apply competency testing programs to handicapped students, they should avoid any uniform approach and consider instead an approach based upon individual determinations. (Author/EB)

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COMPETENCY TESTING AND HANDICAPPED STUDENTS

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I. INTRODUCTION

The growing movement among many states and local school districts to require students to pass a proficiency or competency test before they are eligible for a high school diploma has generated an abundant literature[1] discussing its impact on educators, public schools and society generally. Very little, however, has been written that provides guidance on whether or to what extent competency testing programs should apply to handicapped children.

In an article in the September 1977 issue of *Clearinghouse Review*,[2] one of the authors presented six areas of concern about the competency testing movement that raise legal and policy questions: (1) the potential for racial discrimination; (2) inadequate advance notice and phase-in periods prior to the initial use of the tests; (3) possible lack of psychometric validity or reliability of the tests; (4) inadequate match between the instructional program and the test; (5) inadequate remedial instruction that creates or reinforces tracking; and (6) unfair apportionment of responsibility for test failures between students and educators.

Many of these concerns also apply to handicapped students, but the previous article did not specifically consider the special set of concerns that competency testing programs raise for handicapped children. This article discusses some issues concerning the fairness and legality of competency testing programs for the handicapped by raising questions about (1) exemptions for handicapped students, (2) individual determinations, (3) differential diplomas and standards, and (4) differential assessment procedures. The article reflects some preliminary thoughts about these questions, and is offered as the beginning of a dialogue, since other questions and issues of equal or greater importance may emerge after further discussion and deliberation.

II. EXEMPTIONS FOR HANDICAPPED STUDENTS

The first question for handicapped students, as for non-handicapped students, is whether they should be required to pass a competency test as a prerequisite to a high school diploma. Many of the arguments for and against such a requirement for handicapped students are similar to those made with respect to non-handicapped students. Such programs, for example, may have constructive potential to increase proficiency in basic skills and to enhance the meaning of a diploma, but they also have potential to discriminate unfairly against students and to undercut the broader goals of public education.[3] There are also special concerns about the

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1. *See, e.g.*, the nine articles on the topic of *Competencies as the Aim of Education*, EDUCATIONAL LEADERSHIP (November 1977).
2. McClung, *Competency Testing: Potential for Discrimination*, 11 CLEARINGHOUSE REV. 439-48 (September 1977) [hereinafter cited as *Competency Testing*]. For a summary of this article and some model program provisions, *see* McClung, *Are Competency Testing Programs Fair? Legal?* PHI DELTA KAPPAN 397-400 (February 1978).
3. *See, e.g., Competency Testing, supra* note 2, at 439-41, 448.

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fairness and legality of competency testing of handicapped students (like the special difficulty of fair assessment procedures, discussed below) that might lead parents and policy-makers to favor total exemption for all handicapped students, with no change in graduation requirements. The recent changes in special education programs and practices required by the new federal Education for All Handicapped Children Act of 1975[4] (for example, the emphasis on Individualized Education Programs and annual evaluations of these programs[5]) may be another reason parents and policy-makers might favor exemption for handicapped students.

One approach therefore would be to exempt handicapped students from the competency testing program entirely, with no change in graduation requirements for these students. One problem[6] with this approach is that some handicapped students will want and need the same competency testing program provided to non-handicapped students, even if the program offered the same diploma and differential standards (as described below). Therefore, if handicapped students are exempted from the competency testing requirement, they should be given the option of taking the test if they so decide. If policy-makers decide not to exempt handicapped children from the competency testing program, they should consider the issues discussed below before deciding upon the exact nature of the requirement.

III. INDIVIDUALIZED DETERMINATIONS

If a decision is made to apply competency testing programs to handicapped children, our working assumption is that no uniform approach for all handicapped children is equitable due to the non-uniformity of a group ranging from children with minor to severe handicaps. This heterogeneity suggests that decisions about the nature and extent of participation in the program should be made on an individual basis.

For some handicapped children, the fairest approach would be to use the same test, standards, and procedures used for non-handicapped students. For example, a child whose only handicap is a speech impairment could take the same paper-and-pencil test taken by non-handicapped students. For other handicapped children, the fairest approach would entail minor modifications. For example, a blind student could be given the test in braille form. For many children with severe handicaps, the fairest approach would be completely different tests, standards and procedures, or even total exemption from the competency test requirement.

Individual decisions of this kind could be made as part of the process of developing the Individualized Education Program (IEP) required by the Education for All Handicapped Children Act of 1975.[7] This new federal law reinforces a growing trend to individualize the diagnosis, instruction and assessment of handicapped children.[8] Policy-makers in some states, including Missouri,[9] Massachusetts,[10]

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4. The Education For All Handicapped Children Act of 1975, Pub.L. No. 94-142, is codified at 20 U.S.C. §§1401 *et seq.*, and its implementing regulations at 45 C.F.R. §121a.

5. *See* note 7 *infra*.

6. Another possible problem is that exemptions might encourage negative incentives. For example, would some "borderline" students and their parents seek out a special education classification in order to qualify for the handicapped exemption? The line between handicapped and non-handicapped children is often very fuzzy, and difficult definitional problems will be raised. The California statute, for example, provides that "[d]ifferential standards and assessment procedures may be adopted for *pupils with diagnosed learning disabilities*" (emphasis added). *See* note 11 *infra*. Noting that the exact definition of the term is a local district responsibility, the California State Department of Education defines a diagnosed learning disability as "a clinical term used in special education. The term diagnosis implies an identification of casual factors which interfere with a student's learning. The term disability implies a persistent and irreversible state. There is acknowledged difficulty in differentiating between the student who has difficulty learning and the learning disabled child." Technical Assistance Guide, note 11 at 111-14 *infra*. The Education for All Handicapped Children Act of 1975 prescribes a procedure for identifying handicapped children, *see* 20 U.S.C. §§1412(2)(c) and 1414(a)(1). For implementing regulations, *see* 45 C.F.R. §§121a.220, 500, and 531.

7. The Education for All Handicapped Children Act of 1975, *supra* note 4, requires that every handicapped child in need of special education programs and services be provided with an Individualized Education Program (IEP). The IEP is formulated at a meeting attended by school officials, the teacher, the parents or guardian and, where appropriate, the student. At this meeting, information concerning the child's capabilities and achievements is compiled and discussed, and an IEP is written by the team of persons attending the meeting. For legal requirements regarding this procedure, *see* 45 C.F.R. §§121a.340 to 121a.349.

   The individualized education program is a written statement which includes: (1) a statement of the present levels of educational performance of the child; (2) a statement of the annual goals for the child, including short-term instructional objectives; (3) statements of the specific educational services to be provided to the child and the extent to which the child will be able to participate in regular classroom programs; (4) the projected date for initiation of services and the anticipated duration of services; and (5) a statement of the appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether instructional objectives are being achieved. 20 U.S.C. §1401(19).

8. Many parents and educators have been trying for years to individualize instruction for all students. Perhaps the concept of an IEP should be considered for possible adaptation for non-handicapped students. A parent who has been active in a statewide organization for exceptional children recently told us that she has two children — a handicapped daughter and a non-handicapped son — and that her son could also benefit greatly from an IEP.

9. Missouri will institute statewide minimum competency testing next fall for assessment purposes, but has not yet made competency testing part of a graduation requirement. Under the Missouri plan, individual determinations will be made regarding the participation of handicapped students in the assessment program. Missouri educators will look to a handicapped student's IEP to determine whether the student has had a chance to develop the basic skills included on the test. If the student's IEP shows that the handicapped child is learning the skills involved in the assessment, then the child will take the same test as a non-handicapped student. For other children, the IEP could indicate the need to exempt the child from taking the test or the need to follow different assessment procedures, such as oral administration of the test. *Minimal Competency Testing and*

and California,[11] are recommending or requiring individual decisions about competency programs for handicapped children based upon the IEP.

IV. DIFFERENTIAL DIPLOMAS AND STANDARDS

In order to assess the fairness and legality of competency testing programs for handicapped students, the two most fundamental questions are (1) whether there should be *differential diplomas* for handicapped and non-handicapped students, and (2) whether there should be *differential standards* for handicapped and non-handicapped students.

A *differential diploma* for handicapped students may be defined as a diploma that is distinguishable in any way from that awarded to non-handicapped students who pass the competency test. Any distinguishable feature (for example, in the color, shape or wording of the diploma) may harm the handicapped person. This harm will probably be the trigger for legal analysis to determine who is responsible for that harm, and whether the responsible person(s), institution, or government has sufficient reason to justify the harm.[12]

Differential standards for handicapped students may be defined as standards that are different from (usually less stringent than) the standards that non-handicapped students are required to meet. The basic rationale for differential standards is that they are designed to meet the special needs and capabilities of handicapped students. Policy-makers in some states[13] are recommending or requiring differential standards for handicapped students based on the Individualized Education Program (IEP) mandated by the new federal law. The California State Department of Education, for example, recommends that student proficiency standards for handicapped students be set individually rather than set for the group as a whole; that the committee with the responsibility to develop an individual's plan should describe the performance standards in basic skills for which the student may receive a diploma; and that the committee "should prescribe attainable standards which enhance learning."[14]

The three general approaches likely to be considered by parents and policy-makers may be summarized as follows: (1) same diploma and same standards; (2) same diploma and differential standards; (3) differential diploma and differential standards. These three approaches could be applied with respect to all handicapped students, specified sub-groups of handicapped students, or individual students on a case-by-case basis. For reasons set forth below, the authors think that individualized determinations are advisable.

The new California statute on proficiency testing apparently authorizes local districts to adopt any of the approaches summarized above. The statute provides that differential standards *may be* adopted for handicapped students.[15] The statute does not require the same *diploma* for handicapped and non-handicapped students, but local policy

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the Handicapped: Missouri's Plan, PHI DELTA KAPPAN at 367 (January 1978).

10. Massachusetts has not adopted a competency testing program as of this writing. The Advisory Committee on High School Graduation Requirements that was established by the Massachusetts Department of Education, in an October 1977 report entitled A PROPOSAL FOR A MASSACHUSETTS ESSENTIAL COMPETENCY STANDARDS PROGRAM, recommends exemption from the proposed test requirement for "some children with certain specialized needs."

    A different committee established by the Department of Special Education recommends in draft form that the team that writes a child's Individualized Education Program should include in the written plan any necessary modifications in competency testing. This special education committee also suggests that when the team recommends that a given student not take a competency based test, the compensatory skills and criteria to replace that test should be stated in the education plan. Draft recommendations entitled Statewide Competency Standards for Special Needs Students, (1p.), are available from the Federation for Children with Special Needs, 120 Boylston St., Boston, Mass. 02116.

11. The local governing boards of all California school districts maintaining junior and senior high schools are required by a new state law to adopt standards of proficiency in basic skills for pupils by June 1, 1978. The law further provides that "[s]ubsequent to June, 1980, no pupil shall receive a diploma of graduation from high school if he or she has not met the standards of proficiency in basic skills prescribed by the secondary school district governing board." Another provision states that "[d]ifferential standards and assessment procedures may be adopted for pupils with learning disabilities." The stated intent of the legislature in passing the new law is that "pupils attending public schools in California acquire the knowledge, skills, and confidence required to function effectively in contemporary society." AB 3048 *as modified by* AB 65, *amending* Ch. 2 of Part 28 of the CAL. ED. CODE.

    To facilitate implementation of the new law, the California State Department of Education prepared a TECHNICAL ASSISTANCE GUIDE FOR PROFICIENCY ASSESSMENT (1977) (hereafter TECHNICAL ASSISTANCE GUIDE). At pages III-14 and 15, the TECHNICAL ASSISTANCE GUIDE includes a section which discusses (1) defining the term "diagnosed learning disabilities" consistent with the California Master Plan for Special Education, *see supra* note 6; (2) setting and justifying standards for learning disabled students which are different from the standards set for other students, *see* note 14 *infra*; and (3) complying with existing law, rules, and regulations which affect students who have particular learning disabilities (limited to a general statement). Specific recommendations from this section of the TECHNICAL ASSISTANCE GUIDE are described elsewhere in this article, *see e.g. supra* note 6, and notes 14, 15, 16, 20 and 21, and related text *infra*.

12. *See, generally*, Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

13. Missouri, Massachusetts and California. *See supra* notes 9, 10, and 11.

14. TECHNICAL ASSISTANCE GUIDE, *supra* note 11, at III-15. The guide includes the following warning: "Setting differential standards is a potentially sensitive practice. It is important that the various school publics understand how any student will be classified as having a learning disability. They must also understand the process that will be employed to set proficiency standards for the student having a diagnosed learning disability. If these two processes are not thoroughly understood, some may consider the local governing board to be acting in an arbitrary and capricious manner."

15. *See supra* note 11.

will have to be consistent with the stated intent of the legislature that students "acquire the knowledge, skills, and confidence required to function effectively in contemporary society."[16]

V. DIFFERENTIAL ASSESSMENT PROCEDURES

Another important decision for policy-makers is whether differential assessment procedures should be adopted for handicapped students. This could take the form of modifying the paper-and-pencil test given to regular students, and or developing methods of assessment that do not require a paper-and-pencil test.

The use of a modified paper-and pencil test is illustrated by the State of Florida where blind and visually-impaired students may take braille or large-print versions of the statewide test given to non-handicapped students.[17] Modifications of the test instrument, however, are not made for children with other types of handicap, and for some handicapped children this will raise serious discrimination and equal protection questions under state and federal law.[18] Similar legal questions would also be raised for a state that makes no special provisions of this kind for handicapped students, and yet denies diplomas to handicapped students who do not pass the test. The argument would probably be that an unmodified test instrument discriminates against handicapped students (especially those children with sensory or motor problems) on the basis of their handicapping conditions.[19] The argument will be stronger where the modifications are relatively easy to make.

The use of alternatives to a paper-and-pencil test is illustrated by the California statute which provides that local districts may adopt differential assessment procedures for handicapped students.[20] The California State Department of Education emphasizes that "assessment of student performance may be based on multiple criteria, not just a test score."[21]

Whether or not differential *standards* are set for handicapped students, differential *assessment procedures* may be advisable as a policy matter and perhaps even required as a legal matter in some situations. For example, if the purpose of a competency test is to measure a student's ability to perform adequately in certain real-life situations, a direct performance measure may be more accurate than a paper-and-pencil test. Madaus and Airasian write that many of the minimal cognitive competencies for graduation involve application of basic literacy and numeracy skills to real-life situations (for example, checking the accuracy of bills, sales slips, *etc.*, or using the public library, the town and state offices). "These competencies are most validly measured by the most direct means possible, situational or performance examinations which determine if the student can actually perform the behaviors."[22] Although they recognize that direct measurement is often costly and time-consuming, Madaus and Airasian conclude that "indirect paper-and-pencil tests measuring knowledge about the competency areas are not enough. Any indirect or surrogate measurement must be validated against direct performance measures."[23] Thus serious questions about fairness and legality would be raised in this situation if a student (handicapped or not) could show that he was denied a diploma on the basis of performance skills that he could demonstrate by direct assessment, but not by the

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16. *Id.*

17. Florida, the first state to implement a statutory requirement for competency testing as a prerequisite for a high school diploma, instituted statewide tests during the current school year. The test instruments used are designed to survey both mastery of basic skills and functional literacy defined by state standards. "Based on these standards, each district shall provide for the awarding of certificates of attendance and may provide for differentiated diplomas to correspond with the varying achievement levels or competencies of its secondary students." Ch. 232.245, Fla. Stat. *See, generally* Florida's Educational Accountability Act of 1976, FLA. SCHOOL LAW (1976 ed). Ch. 229.55 *et seq.*

    According to Florida Department of Education officials, on the last administration of the test, all the mentally retarded students were exempt from the testing requirement (meaning that they were automatically awarded a certificate of attendance rather than a high school diploma). However, any mentally retarded child, whose parents requested it, could take the competency test. Children who were legally blind could receive the proficiency test in a braille form and children who were visually impaired could receive a large print form of the test.

    State education officials are currently engaged in formulating a policy paper which, if approved by higher level state department officials, will be presented to the legislature as proposed legislative revisions concerning competency testing. (This information was compiled from telephone interviews on January 6, and 11, 1978 with two Florida State Department of Education officials, Dr. F. Stetler, Director of Spedial Education and Ms. Wendy Cullar, Bureau of Exceptional Children).

18. A bill to amend the Florida statute, *supra* note 17, has been introduced by Representative Maxwell. H.B. 445 would, *inter alia*, provide differential diplomas and differential performance standards for mentally retarded students who are unable to meet regular district requirements for graduation. All other handicapped students would be required to meet the regular standards for graduation, provided that the state department of education "shall develop special forms of the state assessment test and special procedures for test administration of exceptional students who are deaf or hard-of-hearing, blind or partially sighted, or physically handicapped, or who have a learning disability." The bill has been referred to the House Education and House Appropriations Committees, but no action has been taken as of this writing.

19. *See, generally*, regulations regarding test instruments used for placement purposes for handicapped persons, 45 C.F.R. §121a.532(c) and 45 C.F.R. §84.35(b)(3). *See also* notes 26 through 28 and related text *infra*.

20. *See supra* note 11.

21. TECHNICAL ASSISTANCE GUIDE, *supra* note 11, at III-15.

22. G. Madaus and P. Airasian, *Issues in Evaluating Student Outcomes in Competency Based Graduation Programs*, 10 J. OF RES. & DEV. IN ED., 79-86 (Spring 1977).

23. *Id.* at 86.

indirect paper-and-pencil measure.[24] This suggests that if a student cannot pass a paper-and-pencil test given by the school, then the school may want to give that student a direct performance measure to be sure that he does not have the requisite skills before denying him a diploma.

VI. LEGAL IMPLICATIONS

The *Clearinghouse Review* article mentioned above states: "The minimal competency requirement as a prerequisite to a high school diploma is a new phenomenon in most states; it is therefore difficult to identify the strongest legal arguments for or against it and even more difficult to predict the judicial response."[25] This statement is especially applicable to competency testing programs for handicapped students. The federal Constitution, statutes and regulations (and comparable provisions in many states) provide handicapped persons with special protection against unfair and discriminatory practices, but as of this writing neither they nor the courts provide specific guidance regarding competency testing of handicapped students.

The regulations implementing Section 504 of the Rehabilitation Act of 1973 are a case in point. One is therefore left with the general language of Section 504:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[26]

The problem is that some handicapped students may be "subjected to discrimination" if they are "excluded from participation in" or "denied the benefits of" the same competency testing program that is provided to non-handicapped students. Other handicapped students may be subject to discrimination and denied the benefits of the program unless differential standards and assessment procedures are provided. Similarly, the potential conflict between the federal statutory presumptions (1) that handicapped students should be integrated into the regular educational program *to the maximum extent appropriate*,[27] and (2) that to provide equal treatment to persons with unequal needs is unfair in *some circumstances*,[28] probably cannot be resolved without individualized determinations. The underscored language in these presumptions also indicates that individual determinations are in order.

The *policy* analysis set forth above also suggests that fair and equal treatment precludes any uniform approach to handicapped students. What is fair for one handicapped student may be unfair for another because individual circumstances vary so greatly. Some handicapped students (like the speech-impaired student mentioned above) who need to be treated like non-handicapped students, but are not, will probably claim violations of the equal protection clause, Section 504, and the federal statutory presumption that handicapped students should be integrated into the regular educational program to the maximum extent appropriate. Other handicapped students (for example, many, but not all, multiply-handicapped persons) who need to be treated

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24. Persons familiar with professional standards for classifying children as mentally retarded will see the analogy between life-skill or adaptive behavior assessments to determine intelligence and life-skill assessments to determine competence. The American Association on Mental Deficiency (AAMD) recommends that no child should be classified as mentally retarded in the absence of "significantly subaverage general intellectual functioning *existing concurrently with deficits in adaptive behavior*, and manifested during the developmental period" (emphasis added). H. GROSSMAN (ed.), MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION, at 11 (1973). Adaptive behavior is defined by the AAMD as "the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group." *Id.*

    Measurements of adaptive behavior are necessary to eliminate "the six-hour retarded child" who is considered normal by family, friends, and community, but in danger of being labeled mentally retarded by the school on the basis of IQ test results. IQ tests measure a narrow dimension of human intelligence, and some people call this "school" intelligence as opposed to the kind of "life-skill" intelligence measured by adaptive behavior. The AAMD offers a set of adaptive behavior scales, and other groups also have developed or are developing similar "objective" measures of adaptive behavior, which may provide some guidance to groups interested in developing applied performance measures for competency testing programs.

25. *Competency Testing*, *supra* note 2, at 441.

26. Section 504 of the Rehabilitation Act of 1973 is codified at 29 U.S.C. §794, and its implementing regulations at 45 C.F.R. §§81 and 84.

27. *See* 20 U.S.C. §1412(5), Education for All Handicapped Children Act of 1975, and its implementing regulations at 45 C.F.R. §121a.550. *See also* regulations for §504 of the Rehabilitation Act of 1973 at 45 C.F.R. §84.34(a); and Hairston v. Drosick, 423 F.Supp. 180, 183 (S.D. W.Va. 1973) (stating pursuant to §504 that it is "imperative that every child receive an education with his or her peers insofar as it is at all possible"); Stuart v. Nappi, No. B-77-381 (D. Conn., Jan. 1, 1978); Donnie R. v. Wood, No. 77-1360 (D.S.C., Aug. 22, 1977); Kampmeier v. Nyquist, 523 F.2d 296 (2d Cir. 1977); Mattie T. v. Holladay, No. DC-75-31-S (N.D. Miss., July 28, 1977). In its only decision involving Section 504 as of this writing, the U.S. Supreme Court considered a challenge to Virginia's tuition reimbursement plan for handicapped children placed in private schools where no appropriate public program was available. The district court had decided the case in favor of plaintiffs on constitutional grounds. The Supreme Court vacated the decision and remanded the case "with directions to decide the claim based on the federal statute, Section 504 of the Federal Rehabilitation Act of 1973 . . . ." Campbell v. Kruse, 46 U.S.L.W. 3213 (October 3, 1977). For details on these and other cases involving §504, *see* §140 of the various issues of the EDUCATION LAW BULLETIN, published by the Center for Law and Education. *See generally* CENTER FOR LAW AND EDUCATION, STUDENT CLASSIFICATION MATERIALS, 87-98 (June 1976 Supplement).

28. In comments to the final regulations under §504 of the Rehabilitation Act, HEW notes that "different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity." 42 Fed. Reg. 22676 (May 4, 1976).

differently from non-handicapped students, but who are not provided with differential standards and/or assessment procedures, will probably claim violations of the equal protection clause, Section 504, and the federal statutory presumption that to provide equal treatment to persons with unequal needs is unfair in some circumstances.[29]

Whatever approach the various states and local school districts take toward competency testing and handicapped students, that approach cannot be inconsistent with the requirements of the Education for All Handicapped Children Act of 1975. The Individualized Education Programs required by the Act[30] could be used in making the kind of individualized determinations suggested in this article, but should not conflict with the responsibility of public schools to provide a free and appropriate education pursuant to the Act and Section 504.

In sum, it is hard to make any generalized statement about the legality of competency testing of handicapped students except that individual needs and circumstances are likely to be a key concern. The courts traditionally stress individual cases and specific factual situations as much as possible, and reach different results accordingly. Therefore we think that if parents and policy-makers decide to apply competency testing programs to handicapped students, they would be well advised to avoid any uniform approach for all handicapped children, and to consider instead an approach based upon individual determinations.

VII. CONCLUSION

This article was written because the authors have received many requests for information about competency testing of handicapped students. Preliminary research revealed only sparse materials on the subject, and policy-makers in many states are on the verge of developing competency testing legislation and programs that will affect handicapped children. Given the relative scarcity of materials and the difficulty of the issues presented, more careful deliberation is essential. Persons who have materials or thoughts to contribute to a better understanding of competency testing of handicapped children are encouraged to share them with the authors who will share them with others.

29. *Compare* Aspira v. Bd. of Ed. of City of New York, 58 F.R.D. 62 (1973), a bilingual education case where Judge Frankel noted "a growing principle that at least in respect of cherished human interests . . . the notion that sharply disparate people are legally fungible cannot survive the constitutional quest for genuine and effective equality." *Compare* also Lau v. Nichols, 414 U.S. 563 (1974), where the Supreme Court held that refusal to provide education geared to the needs of non-English speaking Chinese students (by either instruction in English or classes in Chinese) violated Title VI of the Civil Rights Act of 1964. The Court noted how absolute equality can lead to functional exclusion: "Under these state-imposed standards, there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *See generally* cases discussed in Part IV of STUDENT CLASSIFICATION MATERIALS, *supra* note 27.

30. *See supra* note 7.